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IN THE

Supreme Court of the United States

No. 73-629

OCTOBER TERM, 1973

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

NATIONAL CASH REGISTER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Ohio (A. 128) is reported at 35 Ohio St. 2d 166, 298 N. E. 2d 559 (1973).

JURISDICTION

The final judgment of the Supreme Court of Ohio denying rehearing was entered on September 6, 1973 (A. 1). A jurisdictional statement was filed on October 10, 1973. On December 17, 1973, the appeal was dis-

missed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari was granted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

QUESTION PRESENTED

When does the exemption from taxation provided in the Import-Export Clause of the United States Constitution attach to property otherwise taxable under the laws of the State of Ohio?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provision of the United States Constitution is contained in Article I, Section 10, Clause 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

The relevant Ohio tax statutes are §5709.01 and §5711.13 of the Revised Code of Ohio, set forth in Appendices A and B, *infra*, at 25 and 26.

STATEMENT

The National Cash Register Company (NCR) has its world headquarters, main production facility, and warehouse in Dayton, Ohio (A. 93, 94).[1] For many years it has engaged in the manufacture of cash registers, accounting

[1] "A." references are to the separately bound Single Appendix. Appendices A and B are bound with this brief.

machines, and data processing systems which it markets throughout the United States and in 120 foreign countries. (A. 56, 57, 90).

For marketing purposes, NCR is organized into two major divisions, domestic and international, each separate from the other. The international marketing division has its own chief executive, a group vice-president responsible only to the president of NCR, and its own accounting staff, sales force, product line, and physical facility. With respect to inventory, the international division maintains its own record control system and packaging processes for its products (A. 56, 94).

When a foreign order is placed with NCR, it is sent to the factory in Dayton where the product is manufactured. NCR maintains no inventory of machines available to meet incoming orders from foreign customers (A. 62, 98). An order form from a foreign customer indicates the type of machine and the individual model to be purchased, the basic construction of the individual machines, the number of machines ordered, their destination, and the terms of sale (A. 60, 61, 62). Each order is accompanied by a building construction sheet prepared by the individual salesperson in the foreign country with the assistance of technical people in that country, which details the functions the machines must perform (A. 59, 65-70).

When the foreign order and the building instruction sheet are received by NCR, a factory work order card is prepared. This enables the factory to build the machine to the exact specifications of the customer (A. 70-72). After a machine is produced and inspected, it is packed for export shipment (A. 72, 73, 98).

The property involved in this case was specifically constructed for foreign customers, finished, crated, and in

storage awaiting foreign shipment in the NCR Dayton warehouse on December 31, 1967, when Ohio personal property tax was assessed against it (A. 88). As of that date,

> "* * * they were simply stored awaiting shipment—title and possession was in [NCR], payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of [NCR]; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. * * *"
>
> *National Cash Register Co.* v. *Kosydar*, 35 Ohio St. 2d 166, 175; 298 N. E. 2d 559, 564, 565 (1973) (O'Neill, C. J. dissenting). (A. 138, 139).

NCR maintained an international inventory of goods for several reasons:

(1) To consolidate an entire order, because the foreign country to which the machines are sent will not permit a partial shipment. (A. 88);

(2) To await the availability of particular foreign currency without which an importation license will not issue. (A. 88, 89);

(3) To await the issuance of a letter of credit. (A. 89).

Nevertheless, and essentially on the grounds that the machines produced for export were built only to order and to foreign specifications, NCR appealed the Tax Commissioner's assessment to the Ohio Board of Tax

Appeals. NCR's notice of appeal stated that since the machines were manufactured solely for export, the assessment was "* * * in violation of Article I, § 10, Clause 2, of the Consttiution of the United States." (A. 49).

The Ohio Board of Tax Appeals affirmed the assessment of tax. It based its decision on all of the federal and most of the state decisions bearing upon the Import-Export Clause, nearly one hundred years of precedent, prescribing two criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

"(1) the property must have started on its journey to a foreign destination

"(2) the property must be irrevocably committed to export." (A. 126).

Further, the Ohio Board of Tax Appeals found that while there appeared to be many variables pertaining to *when* the movement contemplated in number (1) above begins, nowhere was it said that the second test alone, as advocated by NCR, was sufficient. (A. 127). NCR appealed that decision to the Supreme Court of Ohio. Again, the same issue of constitutional immunity from state taxation was raised. The Supreme Court of Ohio reversed the decision of the Ohio Board of Tax Appeals, permitting the "certainty of export" test alone to prevail.

The Ohio Court based its decision on facts in the record that showed that no machine manufactured by NCR for the international division was diverted, or able to be diverted, to the domestic market (A. 89, 100). Due to the special construction of the machines for foreign customers, the machines could not *economically* be converted for domestic use and sale. Against NCR's profit margin of approximately five percent per unit, the

conversion cost would be approximately sixteen percent (A. 82, 83).

Any such attempted conversion would involve, of necessity, complex technical variations in electrical current used by the machines and the electric systems of the machines. (A. 86, 87). In the case of cash registers, the indicator, registration and cash drawer were unique to the foreign country where the machine would be used. (A. 77-88, 95).

The Supreme Court of Ohio relegated the necessity that the journey to a foreign destination be commenced to situations involving fungible goods. NCR's "* * * cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific foreign consumers" were found immune from state taxation under Article I, Section 10, Clause 2 of the United States Constitution. (A. 133, 134).

SUMMARY OF ARGUMENT

The sole issue in this case is when the exemption from state taxation provided in the Import-Export Clause of the United States Constitution attaches to goods manufactured and located in Ohio. As found in the leading export cases decided by the Supreme Court of the United States from 1886 to 1949, the answer is simply that personal property is not immune from state taxation unless it has started on its journey to a foreign destination.

The personal property of NCR, an Ohio taxpayer, was assessed by the Tax Commissioner of Ohio while it was merely stored in a warehouse awaiting shipment. It had not entered into the stream of export. NCR's ultimate intent to export the property is not enough to commence the process of export and change property awaiting shipment into an export.

The effect of the decision of the Ohio Court is an unwarranted and significant erosion of the decisions of the United States Supreme Court that define "export." Moreover, it allows the Ohio taxpayer to be relieved of its proper share of state taxes upon its inventory awaiting shipment. The revenue raised by the state tax is used to provide local services that benefit the taxpayer.

ARGUMENT

PERSONAL PROPERTY IS NOT IMMUNE FROM STATE TAXATION UNLESS IT HAS STARTED ON ITS JOURNEY TO A FOREIGN DESTINATION.

The controversy embraced in the legal issue presented by this case antedates the founding of the federal government.[2] It involves the question of a state's power to tax against the freedom of exports from state taxation. It finds expression in the Import-Export Clause of the United States Constitution, which provides in part that

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports * * *."

The interpretations and application of this constitutional concept are found in nearly one hundred years of United States Supreme Court precedent stemming from *Coe* v. *Errol*, 116 U.S. 517 (1886). They are simply that personal property is not immune from state taxation unless it has started on its journey to a foreign destination. Decisions to that effect are many and controlling and show the historical development of the test of "what is an export."

In *Coe* v. *Errol*, 116 U.S. 517 (1886), spruce logs were cut in New Hampshire and placed in a stream to be

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[2] See Madison, *Debates in the Federal Convention of 1787*, 538-541, 573-577, 622-623, 717-718 (Scott ed.; 1839).

floated down the Androscoggin River to the State of Maine to be manufactured and sold. The logs were detained in the Town of Errol, New Hampshire, by low water and were taxed by the selectmen of Errol in the year 1881. Mr. Justice Bradley said that the "precise question for solution" was:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" (116 U.S. 525.)

The answer was no, because the spruce logs had not entered the stream of export. The Court stated:

> "* * * nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State. (116 U.S. 525.)

In a rhetorical question, the Court asked "* * * until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?" (116 U.S. 526.) There was no answer, for the Court decided that the logs were precisely the kind of property subject to state taxation.

Turpin v. *Burgess*, 117 U.S. 504 (1886), found that an excise tax on tobacco, *before* its removal from the fac-

tory, was not a duty on exports within the constitutional prohibition, even though the tobacco was intended for later export. Mr. Justice Bradley again asked how a state tax on property still resting in the state could be improper:

> "But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds." (117 U.S. 507.)

Cornell v. *Coyne*, 192 U.S. 418 (1904), involved a federal stamp tax on "filled cheese." The taxpayers were manufacturers who entered into contracts for the manufacture and export of cheese. They were required to affix stamps to the exported packages. An immunity from taxation was claimed under Article I, Section 9, Clause 5 of the United States Constitution which reads: "No tax or duty shall be laid on articles exported from any State." In subjecting the manufactured cheese to taxation, the Court decided:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and *does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.* * * *"
>
> (192 U.S. 427; emphasis added.)

The next case, *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), involved a federal tax on baseballs and bats sold by the manufacturer. A Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with Spalding and instructed it to deliver the goods to an exporting carrier in New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued. Tax was levied on the sales of baseballs and bats.

Mr. Justice Holmes stated the issue: "[w]hether the sale was a step in exportation * * *". (262 U.S. 68.) He concluded that exportation had begun:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. "* * * * * * * * *"
>
> (262 U.S. 68.)

The *Spalding* case also is important because it echoes a problem consistently encountered in cases decided under the Import-Export Clause. The problem is where to draw the line beyond which manufactured goods are immune from state taxation. Just as the Supreme Court has been called upon to determine when imports are no longer to be treated as imports, so the Court has been faced with drawing the line as to when goods destined for export have not yet taken on the cloak of immunity as an export. In terms of imports, Chief Justice Marshall stated both the problem and the solution in *Brown* v. *Maryland*, 12 Wheat. 419, 441-442 (1827), "[t]here must be a point of time when the pro-

hibition ceases, and the power of the State to tax commences; * * *."[3] In terms of exports, there must also be a point in time when the power of the state to tax ceases and the constitutional immunity from taxation begins. Mr. Justice Holmes recognized this in *Spalding* when he said:

> "So we return to the question that we have stated. [When does export begin?] To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. *As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary.*" (262 U.S. 69; emphasis added)

That point that commences exportation, as drawn by the Court, is at the time when goods begin actual movement into the stream of export. That point was never reached by NCR's goods in Ohio. They remained in the Dayton warehouse in inventory on tax listing date (A. 88, 89). Ohio's power to tax did not cease as of December 31, 1967.

The requirement that goods must begin their journey before they are exports was reiterated in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). The taxpayer there was a California refiner and seller of oil that entered into a contract with the government of New Zealand to deliver oil "f.o.b." Los Angeles. The oil was transported from taxpayer's refinery to the harbor where it was placed in the taxpayer's storage tanks When a New Zealand ship arrived, the taxpayer pumped the oil from its storage tanks into the hold of the ship. At the same time, the taxpayer received a bill

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[3] See *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U. S. 534, 558-559 (1959).

of lading indicating it was the shipper. The tax authorities levied a tax upon the gross receipts paid to the taxpayer. The Supreme Court of California held that since delivery of the oil marked passage of title, which was the time the tax attached, the transaction was not exempt since export had not begun. The California Supreme Court suggested that if the oil had been placed upon a common carrier rather than on the purchaser's ship, a different result might have occurred (329 U.S. 74).

On appeal to the United States Supreme Court, California relied upon *A. G. Spalding Co., supra*, as supporting its proposition that delivery to a common carrier marked the start of the export process. In rejecting this contention, the Supreme Court of the United States commented:

> "The certainty that the goods are headed to sea and that the process of exportation has started * * * may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. *It would not be clearer that the oil had started upon its export journey had it been delivered to a common*

> *carrier at an inland point.* The means of shipment are unimportant so long as the certainty of the foreign destination is plain." (329 U.S. 82-83; emphasis added.)

The first two sentences of this holding cannot be seized upon to argue that mere certainty of foreign destination is the sole criteria which qualifies property *intended* for foreign destinations as exports. The entire holding shows that the Court found that the export journey had begun: "That delivery marked the commencement of the journey of the oil abroad." The question was whether a different result should obtain since the oil had been delivered to the purchaser's ship rather than a commercial carrier. The Court did not disregard the requirement of delivery as a criteria for an export, but rather found that the oil entered the export stream upon delivery to the purchaser's ship.

In 1949, the Supreme Court decided two export cases. In *Joy Oil Co.* v. *State Tax Commission,* 337 U.S. 286 (1949), a Canadian corporation bought gasoline in the United States for export to Canada. The gasoline was shipped by rail to Detroit and was stored in tanks for fifteen months before it was shipped to Canada. A municipal ad valorem tax was assessed on the gasoline.

The Supreme Court found the gasoline not immune from taxation. Mr. Justice Franfurter explained:

> "The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. * * *
>
> "* * * * * * * * *
>
> "The Export-Import Clause was meant to confer immunity from local taxation upon property

> being exported, not to relieve property eventually to be exported from its share of the cost of local services * * *." (337 U.S. 288, 289.)

Finally, *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949), restated the necessity that the journey of exportation must have begun.[4] A cement plant in Merced County, California, was sold to a South American corporation for export. An export license was issued, title passed, and a common carrier was hired to dismantle and package the plant for shipment. The County of Merced levied a personal property tax on the parts of the plant that had not been shipped out of the country.

The Supreme Court upheld the tax levy, stating:

> " . . . it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it * * *. *It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.*" (337 U.S. 156-157; emphasis added).

The *Empresa* case is also significant because it belies the belief of the Ohio Court that *all* the Supreme Court cases defining exports "* * * embraced products which were completely fungible or were viewed as such." (A. 133). In *Empresa*, the property tax was levied on the various parts of a cement plant that were (1) crated and ready for shipment; (2) dismantled but not yet packed; and (3) not yet dismantled. The various parts of the plant were not fungible goods nor can they be viewed as such. The Supreme Court has never based its definition of "exports" upon a determination of whether the goods to be exported were fungible or nonfungible goods.

[4] For a discussion of this case, see Note, 22 S. Cal. L. Rev. 184 (1949).

The dissenting opinion of the Ohio Court recognized this mistaken interpretation of the case law and countered it by saying:

> "Such a fungible-goods argument may have some validity once the process of exportation has started and the exemption attaches to the goods. Then and only then, under the cases, does the question arise as to the certainty of the goods completing the process and reaching the foreign destination as against the possibility of being diverted to the domestic market. See, *e.g., Joy Oil Co., supra; Empresa Siderurgica, supra.* However, the fungible-goods argument is not relevant to the question presented in the instant case."
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> *National Cash Register Co.* v. *Kosydar,* 35 Ohio St. 2d 166, 173, 174, 298 N.E. 2d 559, 564 (1973) (O'Neill, C. J. dissenting). (A. 137).

Thus, the Supreme Court has extended the protection of the Import-Export Clause *only* to those goods which have actually begun movement into the export stream. In *Coe* v. *Errol,* the spruce logs had not started upon their ultimate passage to another state. In *A. G. Spalding,* delivery of packages to an exporting carrier for shipment granted immunity from state taxation. In *Richfield Oil Corp.,* the state retail sales tax was void because the oil had been delivered into the hold of the vessel which took it to New Zealand. In *Joy Oil,* the fact that the gasoline was eventually to be exported did not render it immune when it was stored for fifteen months. And in *Empresa Siderurgica,* the parts of the cement plant not committed to movement out of the country on tax lien date were not exports.

In NCR's case, its goods were warehoused in Dayton Ohio. They had not begun their journey. They had not been delivered to a carrier when Ohio personal property tax was assessed by the Tax Commissioner. The goods

were not in the export stream and were properly subject to Ohio taxation. This was the decision of the Ohio Board of Tax Appeals, which rested solely on its interpretation of the Import-Export Clause, but which was reversed by the Supreme Court of Ohio.

The Ohio Court's decision must also be viewed in its relation to the decisions of other state courts. The Ohio decision is, with one exception, the *only* state decision to ignore the requirement that goods must have entered the stream of export before they gained immunity from state taxation.

The most consistent state decision-making on the export issue is found in California cases. With one exception, all adhere to the rule that if property has not on tax day entered the export stream, even though destined for export, it is subject to state taxation.

The taxpayer in *Gough Industries, Inc.*, v. *State Board of Equalization*, 51 C. 2d 746, 331 P. 2d 161 (1959), was a California manufacturer of electrical supplies who sold goods in California to a purchaser for export to Saudi Arabia.[5] Because the manufacturer could not meet the specific foreign packaging requirements, the goods were shipped first by truck to a packer. Title passed at the time the goods were delivered to the packer. The California Supreme Court determined that a state sales tax assessment was invalid under the Import-Export Clause of the Constitution because "* * * the movement of the goods had started on a continuous journey in foreign commerce from Los Angeles to Saudi Arabia when the tax was imposed." (51 C. 2d 750).

The taxpayer in *Union Oil Co. of California* v. *City of Los Angeles*, 38 Cal. Rptr. 923 (1964), did not include in its gross receipts for city license tax purposes the receipts from sales of petroleum products to the United States

[5] For a discussion of this case, see Note, 1 B. C. Ind. & Com. L. Rev. 104 (1959).

government. All such products were either pumped aboard a merchant ship or delivered to a port of embarkation for transhipment either by merchant ships or government ships. All petroleum products were transported and consumed thereafter outside the United States. The Court of Appeal found that the city tax was improperly imposed on exports.

The Supreme Court of California found that sales of "bunker fuel oil" for consumption by both foreign and domestic ships going to foreign ports were not immune from state sales tax as exports in *Shell Oil Company* v. *State Board of Equalization,* 51 Cal. Rptr. 524, 414 P. 2d 820 (1966). The Court worried about an extension of the concept of "export" requiring the "* * * invalidating of a tax on any product, process or service somehow related to and necessary for exportation. The acceptance of such a contention would 'lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined.' [citation omitted]" (414 P. 2d 825).

Two cases involving the same parties are the next relevant California decisions. In *Hugo Neu Corp.* v. *County of Los Angeles,* 241 Cal. App. 2. 703, 50 Cal. Rptr. 916 (1966), property taxes were levied on iron and steel scrap physically located at taxpayer's California plant but held for shipment to Japanese customers. Certain of the scrap was held for potential obligation to Japanese buyers and the remaining scrap was actually committed to one buyer, the Gosho Company. The taxpayer contended that the scrap had entered the export stream and was immune from state taxation.

The Court of Appeal held:

> "* * * the twofold test for immunity from taxes was not satisfied. The movement from the original purchase to the depot in Los Angeles was merely preparatory and not pursuant to any definite or

assured plan to export. There was lacking the certainty that the goods were headed for a foreign destination. At the time of the original movement of the scrap, the original Japanese buyers had not validly contracted for the prepared scrap, and, as of that date, it was possible that those buyers would never order it.

"* * * * * * * * *

"As for the scrap contracted for by The Gosho Company, although a contract with The Gosho Company did exist prior to the taxing date, there was no movement or other acts, *after* the formation of that contract, or referable to it, such that immunity could have been conferred on that particular portion of the prepared scrap. * * *."

(241 Cal. App. 2d 709).

In *Hugo Neu Corp.* v. *County of Los Angeles*, 7 Cal. App. 3d 21, 86 Cal. Rptr. 332 (1970), the same basic facts existed. Property taxes were assessed upon steel scrap located at taxpayer's plant awaiting shipment to Japan. As in the instant case with NCR's cash registers and other goods, the scrap was not produced for domestic sales or use. Once again, the Court of Appeal found that "[b]oth certainty and motion—or commitment thereto—are necessary to a finding that goods are exports; further, they must exist concurrently." (7 Cal. App. 3d 24).

The Court noted that "the real trouble" with taxpayer's argument was that on tax lien date, the scrap had not started on a transportation to Japan in a continuous route or journey. "It rested at the very same plant where plaintiffs had acquired it." (7 Cal. App. 3d 25). The same trouble plagues NCR in this case. The cash registers and other equipment rested at Dayton where they were manufactured (A. 88, 89). They had not begun their journey and were not exports when property tax was levied.

The only aberrant California decision is *Montrose Chemical Corp.* v. *County of Los Angeles*, 243 Cal. App.

2d 300, 52 Cal. Rptr. 209 (1966). County taxes were levied upon packaged "D.D.T. Concentrate" located at taxpayer's plant on tax lien date. The D.D.T. had not been delivered to a dock or warehouse; had not been delivered to a common carrier; and had not, in any way, begun physical movement out of the country. The Court of Appeal held that the goods were immune from taxation because "* * * it was certain that the D.D.T. Concentrate, which could not be sold in the United States and which had been especially packaged for overseas shipment to a particular purchaser, was committed to a foreign destination and could not be diverted to domestic use." (243 Cal. App. 2d 304). Attention to prior and subsequent decisions shows, however, that *Montrose* is not the prevailing rule in California export decisions. Moreover, one California court recognized that the decision in *Montrose* cannot be reconciled with the prevailing United States Supreme Court decisions or with the California cases. *Rice Grower's Association of California* v. *County of Yolo,* 17 Cal. App. 3d 227, 94 Cal. Rptr. 847, 850 (1971).

In the *Rice Grower's* case, the taxpayer operated a rice mill which processed rice for export to Puerto Rico, Okinawa, and Japan. As in the instant case, the rice could not be marketed domestically without remilling which was economically unfeasible. Tax was levied on rice stored variously at taxpayer's warehouse and at ports awaiting ocean transportation. The Court concluded that all rice was properly taxed because it did not become an export until "* * * it was loaded into the ship carrying it to the foreign county." (94 Cal. Rptr. 852).

The Court of Appeal summarized most of the cases in the export area and formulated eleven propositions of law. The first two are directly contrary to the Ohio Court's contention that "certainty of export" is the proper test:

"(1) The intention to export is not enough." [Citations omitted]

"(2) Manufacturing goods or processing to fill an export order, even to consignee's specifications, does not constitute the goods an export, before the final uninterrupted journey commences." [Citations omitted] (94 Cal. Rptr. 853).

The last California case is *Cargill of California, Inc.* v. *County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972). The Court of Appeal decided that a personal property tax levied on alfalfa pellets stored at a port facility was improper under the Import-Export Clause. The court found that the movement of pellets from the taxpayer's production facility to the shipping port was the beginning of a continuous foreign journey. This fact, along with the certainty of foreign export and the reasonableness of the interruption of the journey by storage at the port, rendered the goods immune from state taxation.[6]

Just as important as precedent in this case is whether the State of Ohio has given anything to NCR for which it can ask return. The General Assembly of Ohio, a co-equal partner in the government of the state, enacted §5709.01 of the Revised Code of Ohio, which provides that "* * * All personal property located and used in business in this state * * * [is] subject to taxation * * *." (Appendix A, *infra*, at 25). §5711.13 directs the Tax Commissioner of Ohio to "* * * assess the personal property of such corporation in the several taxing districts in which it is required * * *." (Appendix B, *infra*, at 26).

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[6] Other state decisions dealing with state taxation under the strictures of the Import-Export Clause include *Multnomah County* v. *Dant & Russell, Inc.*, 75 P. 2d 986 (1938); *Alaska S. S. Co.* v. *State of Washington*, 196 P. 2d 1001 (1948); *Eardley Fisheries Co., Inc.*, v. *City of Seattle*, 314 P. 2d 393 (1957); *Myers* v. *Commissioners of Baltimore County*, 35 A. 144 (1896).

Taxation of tangible personal property is an important part of Ohio's plan of taxation.

> "An outstanding feature of the Ohio State-local tax structure is its degree of dependence on revenue from tangible personal property. In 1966, this component of the property tax produced $289 million, all of which went to local governments. This amount was more than one-fifth of all taxes levied on real estate, public utilities, and tangible personal property. No other state approaches Ohio in the amount of revenue obtained from this source."
>
> (*Ohio Tax Study Commission Report*, Chapter IV, 1965-1967).

As noted in the dissenting opinion of O'Neill, C. J., below (A. 135; 35 Ohio St. 2d 166, 172), the revenue raised by the tax imposed is used in accordance with Ohio law to pay for the local services of government by counties, municipalities, townships, and health districts, including the operation of schools.[7] This provides benefits for all the citizens of Ohio, both private and corporate, in the respective local communities.

While NCR would understandably like to be relieved of its share of these state taxes, the only basis upon which it can claim such relief is by a new interpretation of the Import-Export Clause of the United States Constitution. As heretofore noted, that clause has been construed by the United States Supreme Court to grant immunity from state taxation *only* in those cases where the journey of exportation had begun. Unless that interpretation is modified by the Supreme Court of the United States, it must stand as the limit of taxation as much for the State in terms of what it may validly collect and distribute as for its citizens in terms of what must be paid. The Su-

[7] Chapter 5705, the tax levy provisions of the Revised Code of Ohio, directs the distribution of tax revenue. See §5705.05.

preme Court of Ohio may no more restrict what the State of Ohio may collect under the federal Import-Export Clause than it may expand an Ohio citizen's tax liability beyond the limits therein described. Yet in the Ohio Supreme Court opinion dated July 11, 1973, the carefully and consistently developed definition of "export" was swept away.

The inconsistency of the Ohio Court's decision with the constitutional interpretation and policy of the Import-Export Clause can be best illustrated by example:

> "The plant facilities of manufacturers A and B are contiguous. Both manufacture similar products. A manufactures exclusively for domestic consumption, while B produces solely for the foreign market. Both have in their warehouses inventories worth fifty thousand dollars. An ad valorem property tax is levied against both A and B on the lien date. B pays under protest and seeks a refund of the tax because the taxed goods had been manufactured pursuant to a contract with a European based company, had been crated for overseas shipment, and were manufactured pursuant to foreign specifications. The producer, B, was simply awaiting shipping instructions before delivering the goods to a common carrier. The court finds that the foreign destination of the goods is sufficiently clear and orders a refund.
> * * *
>
> "However, it is clear that manufacturers A and B have benefited equally from state protection and facilities. This broad exemption for exports places a disproportionate share of the tax burden upon A, the taxpayer who manufactures for domestic consumption."
>
> (Note, *Import-Export Clause: A Blanket Prohibition Misapplied,* 40 S. Cal. L. Rev. 528 (1967)).

It is also clear in this case that NCR's goods have benefited equally with other Ohio manufacturers' goods from state protection. This is especially true for those NCR products that remained in Ohio for as long as three years. (A. 89).

NCR will ask this Court, as it did the Ohio Court, to weaken the rule regarding the precise point where the process of exportation begins by carving a new immunity for those goods manufactured solely for export and "certain to be exported." However, the rule regarding exports, valid for almost a hundred years, should not be changed, as the Ohio Court sought to do. The effect of recognizing an earlier point as the beginning of the process of exportation would result in a new and unwarranted curtailment of state taxing power. This curtailment would conflict with the recognition by the Supreme Court of the importance of meeting state revenue needs. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 452 (1959).[8] The need for state revenue is most valid when, as here, the state has given state protection and benefit to a taxpayer from whom it asks payment in return.

Finally, the new definition of export created by the Ohio Court may well be productive of greater state litigation, not only in Ohio but in every state. The test of "what is an export" advocated below is a subjective one. That is, are the goods *intended* to be exported? The present test of entrance into the stream of export is definite and objective. It has the virtue of being a practical test for state tax administration. It can be administered

[8] See also *Rice Grower's Association of California* v. *County of Yolo*, 17 Cal. App. 3d 847, 850 (1971), *American Smelting & Refining Co.* v. *County of Contra Costa*, 77 Cal. Rptr. 570, 585 (1969); and *Pan American World Airways, Inc.* v. *Government of the Virgin Islands*, 459 F.2d 387, 394 (1972).

firmly, fairly, and consistently, not only be the Tax Commissioner of Ohio, but by all state tax administrators. It is also easily recognizable by all taxpayers who have the obligation to pay state taxes.

After almost one hundred years of precedent, the Supreme Court should reaffirm that personal property is not immune from state taxation unless it has started on its journey to a foreign destination.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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APPENDIX A

5709.01 Taxable property entered on general tax list and duplicate.

All real property in this sate is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco, which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United State government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property. (132 v H 480. Eff. 12-2-67. 126 v 166)

APPENDIX B

5711.13 Corporation shall make combined return; assessment; certification to auditor of state.

A corporation having taxable property required to be listed in more than one county shall make a combined return to the tax commissioner listing all its taxable property in this state, in conformity with sections 5711.01 to 5711.36, inclusive, of the Revised Code, but it shall not assign its property of the kinds mentioned in section 5709.02 of the Revised Code to any particular taxing district or county. The commissioner shall assess the personal property of such corporation in the several taxing districts in which it is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by section 5711.25 of the Revised Code. All other property of such corporation required to be so listed shall be entered on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state and taxed under section 5707.03 of the Revised Code. The commissioner shall assess all other property of each corporation, and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind thereof to the auditor of state, who shall enter same on the intangible property tax list in his office in the manner provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code. Sections 5711.01 to 5711.36, inclusive, of the Revised Code, shall apply to and govern such corporation, its proper officers and representatives, the commissioner, and the county auditor as to all proceedings in the assessment of the property of such corporation. (129 v 582. Eff. 1-10-61)